AIRASIA BHD v. RAFIZAH SHIMA MOHAMED ARIS

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM JCA
[CIVIL APPEAL NO: B-02-2751-11-2012]
3 JULY 2014

CONTRACT: *Employment contract – Termination – Validity – Agreement for training programme required respondent to resign upon being pregnant – Whether discriminatory against respondent's rights as married woman – Whether agreement contravened art. 8 of Federal Constitution – Whether in contravention of Convention on the Elimination of All Forms of Discrimination against Women – Whether there was lawful contract between private parties*

CONSTITUTIONAL LAW: *Fundamental liberties – Equal protection – Gender discrimination – Agreement for training programme required respondent to resign upon being pregnant – Whether agreement contravened art. 8 of Federal Constitution – Whether in contravention of Convention on the Elimination of All Forms of Discrimination against Women*

CONSTITUTIONAL LAW: *Legislation – International law – Convention on Elimination of All Forms of Discrimination against Women – Whether has force of law in Malaysia – Whether incorporated into domestic law by Act of Parliament*

INTERNATIONAL LAW: *Conventions – Binding effect within Malaysia – Convention on Elimination of All Forms of Discrimination against women – Whether has force of law in Malaysian – Provisions of international obligations - – Whether has any binding effect if it was not expressly incorporated into domestic law by an Act of Parliament*

The respondent, an employee of the appellant, upon being chosen to undergo an Engineering Training Program on 19 October 2006, executed an agreement known as 'Training Agreement and Bond' ('the agreement'). A material term in the agreement was that the respondent must not get pregnant during the duration of the training period, which was approximately four years from the date the respondent first attended the training course. However, when the respondent furnished the medical report confirming her pregnancy sometime in June 2010, the agreement as well as the employment of the respondent were terminated. The appellant then filed a civil suit at the Sessions Court for breach of the agreement and a summary judgment was entered against the respondent. Dissatisfied, the respondent appealed against the decision and the High Court allowed her appeal. Meanwhile, the respondent filed an originating summons ('OS') in the High Court, seeking that cl. 5.1(4) of the agreement was illegal, null and void as the said clause had the effect of discriminating against the respondent's rights as a married woman and contravened art. 8 of the Federal Constitution ('the Constitution')

A and the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'). The High Court granted the respondent's OS and dismissed the appellant's application to strike out the OS. Hence, the appellant appealed against both decisions. However, at the beginning of the hearing, the second appeal, pertaining to the dismissal of the appellant's B application to strike out the respondent's OS, was struck out on the appellant's application. The appellant submitted that the trial judge had erred in failing to apply the principle in *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* ('*Beatrice* case') to the respondent's OS. It was the appellant's contention that the parties in the respondent's OS were private parties and C as such the provisions of the Constitution had no application. The appellant also submitted that the trial judge had erred in relying on the case of *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* ('*Noorfadilla*'s case').

Held (allowing first appeal with no order as to costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

D **(1)** The interpretation accorded by *Beatrice* case on the constitutional effect is called 'vertical effect' which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority. The High Court Judges must observe judicial precedents in the interest of finality and certainty in the E law and for orderly development of legal rules. (paras 26 & 55)

(2) In *Noorfadilla*'s case, the High Court relied on CEDAW in clarifying what is meant by the terms 'equality' and 'gender discrimination'. Malaysia is a signatory to CEDAW, a landmark international agreement that affirms principles of human rights and equality for women around F the world, and ratified it in 1995. However, CEDAW does not have the force of law in Malaysia because it is not enacted into any local legislation. (paras 29, 30, 35 & 37)

(3) The Constitution contains no express provision with regards to the status of international law, or indeed any mention of international law at all. G For a treaty to be operative in Malaysia, it requires legislation by the Parliament. Therefore, without express incorporation into domestic law by an Act of Parliament following ratification of CEDAW, the provisions of international obligations in the said convention do not have any binding effect. In Malaysia, the Constitution is silent as to the H primacy of international law or domestic law or *vice versa*. If there is such a conflict, the general rule is that the statute shall prevail. (paras 41, 42 & 49)

(4) All clauses contained in the agreement especially cl. 5.1(4) did not restrain marriage and/or prohibit pregnancy if the respondent had I completed the said training programme in the manner stipulated in the agreement. Therefore, cl. 5.1(4) of the agreement does not discriminate against the rights of women. In the circumstances, the agreement entered

into between the appellant and the respondent was a lawful contract between private parties, though it required the respondent to resign upon being pregnant or termination would take place in the event of refusal to resign. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Responden, seorang pekerja kepada perayu, setelah terpilih untuk menjalani Program Latihan Kejuruteraan pada 19 Oktober 2006, telah memeterai satu perjanjian yang dikenali sebagai 'Training Agreement and Bond' ('perjanjian tersebut'). Salah satu terma utama dalam perjanjian tersebut adalah bahawa responden tidak boleh hamil semasa tempoh latihan, yang adalah lebih kurang empat tahun dari tarikh responden mula-mula menghadiri latihan tersebut. Walau bagaimanapun, apabila responden mengemukakan laporan perubatan mengesahkan kehamilan pada Jun 2010, perjanjian tersebut serta pekerjaan responden telah ditamatkan. Perayu kemudian memfailkan guaman sivil di Mahkamah Sesyen bagi pelanggaran perjanjian dan penghakiman terus telah dimasukkan terhadap responden. Tidak berpuas hati, responden merayu terhadap keputusan tersebut dan Mahkamah Tinggi membenarkan rayuannya. Sementara itu, responden memfailkan saman pemula ('OS') di Mahkamah Tinggi, memohon bahawa kl. 5.1(4) perjanjian tersebut adalah bertentangan dengan undang-undang, tidak sah dan terbatal kerana klausa tersebut mempunyai kesan mendiskriminasi terhadap hak responden sebagai wanita berkahwin dan bercanggah dengan per. 8 Perlembagaan Persekutuan ('Perlembagaan') dan Konvensyen Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita ('CEDAW'). Mahkamah Tinggi membenarkan OS responden dan menolak permohonan oleh perayu untuk membatalkan OS tersebut. Oleh itu, perayu merayu terhadap kedua-dua keputusan tersebut. Walau bagaimanapun, di awal perbicaraan, rayuan kedua, berkaitan dengan penolakan permohonan perayu untuk membatalkan OS responden, telah dibatalkan atas permohonan perayu. Perayu menghujahkan bahawa hakim bicara terkhilaf kerana gagal mengguna pakai prinsip dalam kes *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* ('kes *Beatrice*') terhadap OS responden. Perayu menghujahkan bahawa pihak-pihak dalam OS responden adalah pihak-pihak persendirian dan oleh itu peruntukan Perlembagaan tidak boleh diguna pakai. Perayu juga menghujahkan bahawa hakim bicara khilaf apabila bersandarkan pada kes *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* ('kes *Noorfadilla*').

Diputuskan (membenarkan rayuan pertama tanpa perintah untuk kos)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Tafsiran yang diberikan dalam kes *Beatrice* bagi kesan perlembagaan dipanggil 'kesan menegak' yang pada asasnya menyatakan bahawa undang-undang perlembagaan, sebagai satu bahagian undang-undang awam, hanya mempertimbangkan pelanggaran hak-hak individu oleh pihak berkuasa awam. Hakim-Hakim Mahkamah Tinggi perlu

mematuhi kehakiman duluan atas kepentingan kemuktamadan dan kepastian dalam undang-undang dan bagi perkembangan teratur kaedah-kaedah perundangan.

(2) Dalam kes *Noorfadilla*, Mahkamah Tinggi bersandarkan pada CEDAW untuk menjelaskan apa yang dimaksudkan dengan terma 'kesamarataan' dan 'diskriminasi jantina'. Malaysia telah menandatangani CEDAW, satu perjanjian antarabangsa penting yang mengesahkan prinsip-prinsip hak asasi manusia dan kesamarataan kepada wanita-wanita seluruh dunia, dan telah meratifikasikannya pada tahun 1995. Walau bagaimanapun, CEDAW tidak mempunyai kesan undang-undang di Malaysia kerana ia tidak digubal ke dalam mana-mana perundangan tempatan.

(3) Perlembagaan tidak mengandungi peruntukan langsung berkaitan dengan undang-undang antarabangsa, atau apa-apa yang dinyatakan tentang undang-undang antarabangsa. Untuk sesuatu perjanjian beroperasi di Malaysia, ia memerlukan perundangan oleh Parlimen. Oleh itu, tanpa pemasukan secara langsung ke dalam undang-undang domestik melalui Akta Parlimen berikutan ratifikasi CEDAW, peruntukan-peruntukan kewajipan antarabangsa dalam konvensyen tersebut tidak mempunyai kesan mengikat. Di Malaysia, Perlembagaan tidak menyatakan apa-apa berkaitan dengan keutamaan undang-undang antarabangsa atau domestik tersebut atau sebaliknya. Jika ada konflik sedemikian, peraturan am adalah bahawa statut harus mengatasi.

(4) Kesemua klausa dalam perjanjian tersebut khususnya kl. 5.1(4) tidak menghalang perkahwinan dan/atau menghalang kehamilan jika responden telah menyelesaikan program latihan tersebut dalam cara yang dinyatakan dalam perjanjian. Oleh itu, kl. 5.1(4) tidak mendiskriminasi terhadap hak-hak wanita. Dalam keadaan tersebut, perjanjian yang dimasuki antara perayu dan responden adalah kontrak yang sah antara pihak-pihak persendirian, walaupun ia memerlukan responden meletakkan jawatan jika hamil atau akan ditamatkan pekerjaan jika enggan meletak jawatan.

Case(s) referred to:

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(foll)***

Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors [2012] 1 CLJ 769 HC ***(refd)***

Periasamy Sinnapan & Anor v. PP [1996] 3 CLJ 187 CA ***(refd)***

PP v. Datuk Tan Cheng Swee & Anor [1980] 1 LNS 58 FC ***(refd)***

PP v. Narongne Sookpavit & Ors [1985] 1 LNS 20 HC ***(refd)***

PP v. Orhan Olmez [1987] 2 CLJ 13; [1987] CLJ (Rep) 305 SC ***(refd)***

Regional Centre for Arbitration v. Ooi Beng Chooi Anor (No. 2) [1988] 7 MLJ 193 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8(2), 11, 74(1)

International Organizations Privileges and Immunities of the United Nations, 1946, ss. 3, 4
Vienna Convention on the Diplomatic Relations 1961, art. 32

Other source(s) referred to:
Heliliah Haji Yusof, *Internal Application of International Law in Malaysia and Singapore*, [1969] Singapore Law Review 62-71, p 65
Tunku Sofiah Jewa, *Public International Law – A Malaysian Perspective*, Vol I Pacific Publication 1996, p 35

For the appellant - Muhammad Adam Abdullah (Lam Mei Kuan (Wendy) & Wong Jia Ee with him); M/s V Chong W Lam
For the respondent - Harjinder Singh Kuldip Singh (Jayaganes Rajanderan with him); M/s Sabarudin Othman & Ho

[Appeal from High Court, Shah Alam; Originating Summons No: 24-416-04-2012]

Reported by S Barathi

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] Before us there are two related appeals, namely:

(i) Civil Appeal No. B-02-2584-10/2012 ("first appeal"); and

(ii) Civil Appeal No. B-02-2751-11/2012 ("second appeal"), which have been consolidated by an order of this court dated 15 February 2013.

[2] Since both appeals involve the same parties and concern common questions of fact and law, we heard them together.

[3] Both appeals emanate from the decisions of the High Court at Shah Alam, Hadhariah binti Syed Ismail J presiding, in which Her Ladyship had, in the first appeal, allowed the respondent's originating summons ("OS"), seeking for declarations, *inter alia*, that cl. 5.1(4) of the training agreement and bond entered between the appellant and the respondent is illegal, null and void as the said clause has the effect of discriminating against the respondent's rights as a married woman and in turn it contravenes art. 8 of the Federal Constitution of Malaysia and the Convention to Eliminate All Forms of Discrimination Against Women ("CEDAW"). In the second appeal, Her Ladyship had dismissed the appellant's application to strike out the respondent's OS.

[4] At the beginning of the hearing of these appeals, learned counsel for the appellant informed us that the appellant wished to withdraw the second appeal. Accordingly, we struck out the same with no order as to costs and deposit to be refunded.

A **Salient Facts**

[5] In order to appreciate the issues raised in the first appeal, the following salient facts of the case must be noted.

[6] The appellant, AirAsia Berhad, is a company that runs a low cost
B carrier. The respondent was an employee of the appellant. On 19 October 2006, the respondent was chosen to undergo an Engineering Training Programme.

[7] The respondent executed an agreement known as "Training Agreement and Bond" ("Agreement"). A material term in the Agreement
C was that the respondent must not get pregnant during the duration of the training period. The training period was approximately four years from the effective date. Effective date was when the respondent first attended the training course.

[8] The relevant clause reads as follows:

D

> Clause 5.1
>
> It is a fundamental term and condition of the Agreement that none of the following events or circumstances shall occur after execution of this Agreement. The occurrence of any of the following events and
E circumstances shall constitute a repudiatory of the Agreement:-
>
> ...
>
> (4) (This clause is only applicable to female Engineering Trainee) when Engineering Trainee gets pregnant during the Course.

[9] In the month of June 2010, the respondent met with the appellant's
F employee by the name of Kim Chua from the people's department of the appellant and informed the said Kim Chua that she was pregnant and would only deliver her first child at end of 2010. As such, she would want to continue with her training. Kim Chua consequently instructed the respondent to obtain a doctor's letter confirming the pregnancy. The respondent then
G furnished the doctor's letter/medical report to Kim Chua confirming her pregnancy.

[10] By a letter dated 1 July 2010, the Agreement and the employment of the respondent were terminated.

H **[11]** The appellant then filed a civil suit at the Sessions Court for breach of the Agreement. The appellant claimed the sum of RM92,000, being the agreed liquidated damages from the respondent.

[12] On 18 April 2012, summary judgment was entered against the respondent in the Sessions Court for the sum of RM92,000. Dissatisfied, the
I respondent appealed against the decision. Her appeal was allowed by the High Court.

[13] In the meanwhile, the respondent filed an OS in the High Court at Shah Alam on 17 April 2012, seeking for: A

(i) Satu Perintah Deklarasi bahawa klausa 5.1(4) Perjanjian Program Latihan Kejuruteraan bertarikh 5.12.2006 adalah terbatal, tidak sah dan tidak terpakai;

(ii) Satu Perintah Deklarasi bahawa klausa 5.1(4) Perjanjian tersebut adalah bertentangan dengan prinsip kepentingan awam dan/atau seksyen 24(e) Akta Kontrak 1950 dan seksyen 43 Akta Pekerja 1950; dan/atau Artikel 3, 5, 8 dan 11 Perlembagaan Persekutuan Malaysia dan/atau mendiskriminasi hak plaintif sebagai seorang wanita dan isteri yang berumahtangga dan Deklarasi Hak Asasi Pertubuhan Bangsa-Bangsa Bersatu ("United Nations Universal Declaration of Human Rights") dan ("Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); B C

(iii) Satu Perintah bahawa plaintif tidak bertanggungan dan tidak berhutang dengan defendan akibat tindakan defendan secara salah dan tidak sah menamatkan perkhidmatan plaintif berdasarkan peruntukan klausa 5.1(4) Perjanjian tersebut; D

(iv) Satu Perintah Deklarasi bahawa tindakan defendan menamatkan perkhidmatan plaintif berdasarkan peruntukan klausa 5.1(4) Perjanjian Program Latihan Kejuruteraan bertarikh 5.12.2006 tersebut adalah tidak sah dan salah ("illegal") berdasar peruntukan prinsip kepentingan awam dan/atau seksyen 24(e) Akta Kontrak 1950; dan seksyen 43 Akta Pekerja 1950; dan/atau Artikel 3, 5, 8 dan 11 Perlembagaan Persekutuan Malaysia dan/atau mendiskriminasi hak plaintif sebagai seorang wanita dan isteri yang berumah tangga dan Deklarasi Hak Asasi Pertubuhan Bangsa-Bangsa Bersatu ("United Nations Universal Declaration of Human Rights") dan ("Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW); E F

(v) Satu Perintah Penggantungan kesemua prosiding lain yang berkaitan dengan tuntutan ini sehingga pelupusan tindakan ini;

(vi) Gantirugi Punitif, Teladan dan gantirugi Keterlaluan untuk ditaksirkan; G

(vii) Kos;

(viii) Faedah.

[14] At the hearing of the OS in the High Court, the respondent had elected to rely on arts. 8 and 11 of the Federal Constitution and CEDAW. H

[15] The appellant had, on 30 April 2012, filed a summons in chambers to strike out the respondent's OS.

[16] On 12 October 2012, the High Court granted the respondent's OS and dismissed the appellant's application to strike out the OS. Hence, these appeals. I

A **Parties' Respective Submissions**

[17] Learned counsel for appellant submitted that the learned judge fell into serious error when she failed to apply the principle decided in the *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713 ("*Beatrice* case") to the respondent's OS. It was the contention of the learned
B counsel that the parties in the respondent's OS are private parties and as such, the provisions of the Federal Constitution had no application. According to learned counsel, constitutional law as a branch of public law only addresses the contravention of an individual's rights by a public authority. However, when the rights of a private individual are infringed by another private
C individual, constitutional law will take no recognisance of it. It is not in dispute that AirAsia Berhad, is a private limited liability company.

[18] Learned counsel for the appellant further submitted that the learned judge erred in relying on the decision of the High Court in *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769 (*Noorfadilla*'s case) which
D held that the provisions of CEDAW are binding on Malaysia and the same procured the amendment to the Federal Constitution with the introduction of the word "gender" in art. 8(2) of the Federal Constitution. Therefore, the courts have to take into account the provisions of CEDAW when defining or determining gender discrimination.

E **[19]** In reply, learned counsel for the respondent submitted that the respondent was seeking a declaratory relief under the Specific Relief Act 1950 ("Act 137"), *inter alia*, to declare that cl. 5.1(4) of the Agreement was void/illegal because it contravened arts. 8 and 11 of the Federal Constitution and CEDAW. It was the contention of learned counsel for the respondent
F that what the respondent was seeking was an individual remedy and not constitutional remedy.

[20] Learned counsel for the respondent further submitted that the decision in *Beatrice*'s case could be distinguished on the following grounds:

G (i) *Beatrice*'s case placed reliance on a view expressed by Dr. Durga Das Basu in his book, "*Comparative Constitutional Law*". The court must be guarded against simply applying part of decisions from courts of other jurisdictions and adopting the same as part of our written law. It is clearly evident that art. 8(1) or (2) of the Federal Constitution does not
H make any reference to "State", unlike the Indian Constitution;

(ii) *Beatrice*'s case was decided without taking into account the amendment to the Federal Constitution wherein the word "gender" was added to art. 8(2) by the Federal Constitution (Amendment) (No.2) Act 2001 (Act A1130) which came into force on the 28 September 2001; and

I (iii) *Beatrice*'s case was different from the present case in that as an engineering trainee, the respondent is not required to work long hours (depending on the flight schedules) and she was not required to fly in different time zones and required much walking in a tight narrow alley

in the flight as she was a ground crew and more importantly, as an engineering trainee, she could work until delivery, unlike a flight stewardess.

Our Findings

[21] At the outset, it would be appropriate for us to consider the decision of *Beatrice*'s case. The brief facts of the *Beatrice*'s case was that the applicant, a flight stewardess, had 11 years of service with MAS. The terms and conditions of service of the applicant were governed by a collective agreement between MAS Employees Union and MAS. Clause 2 of the collective agreement, para. 3 in particular, required an air stewardess to resign if she became pregnant or face termination if she became pregnant. When she became pregnant, she refused to resign and her services were thereby terminated accordingly.

[22] One of the issues of law raised by the applicant was whether art. 8 of the Federal Constitution applied to the terms and conditions of the collective agreement.

[23] The Court of Appeal in upholding the High Court's decision ruled that a constitutional safeguard such as the right to equality fell within the domain of public law and as such dealt only with the contravention of individual rights by a public authority ie, the state or any of its agencies.

[24] The Federal Court concurred with the Court of Appeal. Abdul Malek Ahmad, PCA, in delivering the judgment of the Federal Court had this to say:

> We took time to examine this allegation carefully and we found it is simply not possible to expand the scope to art. 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art. 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the "law" in art. 8 of the Federal Constitution does not include a collective agreement entered.

[25] In our considered opinion, the learned judge erred in law and facts in not following the Federal Court's decision in *Beatrice*'s case. There is no rhyme nor reason for the learned judge not to follow the decision of the highest court in Malaysia. It is clear that the Agreement entered between the appellant and the respondent is a lawful contract between private parties though it requires the respondent to resign upon being pregnant or termination would take place in the event of refusal to resign.

[26] The interpretation accorded by *Beatrice*'s case on the constitutional effect is called "vertical effect" which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority. We must remind High Court Judges that they must observe judicial precedents in the interest of finality and certainty in the law and for orderly development of legal rules. (See *PP v. Datuk Tan Cheng Swee & Anor* [1980] 1 LNS 58; [1980] 2 MLJ 277; *Periasamy Sinnapan & Anor v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557).

[27] In support of his argument, learned counsel for the respondent relied heavily on *Noorfadilla*'s case. The brief facts of the case was that the plaintiff applied to the Hulu Langat District Education Office for the post of Guru Sandaran Tidak Terlatih ("GSTT"). Several days after the interview, she received confirmation that her application had been successful. When she attended the Hulu Langat Office as instructed, she was briefed on the terms of employment and was asked to report for duty immediately. During this time, an officer enquired if she was pregnant. She indicted that she was and, as a result, the appointment was revoked.

[28] The main issue before the High Court was whether the action of the defendants in refusing to allow a pregnant woman to be employed as a GSTT was tantamount to gender discrimination and a violation of art. 8(2) of the Federal Constitution.

[29] What was significant in that case was the High Court's reliance on CEDAW in clarifying what is meant by the terms "equality" and "gender discrimination". The High Court had this to say:

> ... the word "gender" was incorporated into Article 8(2) of the Federal Constitution in order to comply with Malaysia's obligation under the CEDAW. It is to reflect the view that women are not discriminated ... In Article 11(2)(a) of CEDAW, it provides that State Parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds *inter alia*, of pregnancy ... **[CEDAW] has the force of law and [is] binding on members states, including Malaysia**. [*sic*]. (emphasis added).

[30] Before proceeding to discuss the issue, we would like to advert to some general discussions about CEDAW. CEDAW was adopted by the General Assembly of the United Nations in 1979 and came into force in 1981. It is a landmark international agreement that affirms principles of human rights and equality for women around the world. As of April 2014, 188 states have ratified or acceded to treaty. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

[31] Article I of CEDAW defines discrimination against women as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Thus, it incorporates both direct and indirect forms of discrimination.

[32] Article II expressly relates to women's right to work, equal treatment at the workplace and the same employment opportunities as men. It prohibits dismissal on the grounds of pregnancy in particular.

[33] One of the important principles under CEDAW is the principle of the obligation of the State to implement the Convention and thus give effect to the Convention at the domestic level. By accepting the CEDAW, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

(i) incorporating the principle of equality of men and women in their legal and administrative systems, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women;

(ii) establishing tribunals and other public institutions to ensure the effective protection of women against discrimination;

(iii) ensuring elimination of all acts of discrimination against women by persons, organisations or enterprises; and

(iv) accelerating *de facto* equality by implementing affirmative action, including Temporary Special Measures to address structural discrimination.

[34] Each State decides how best to achieve its implementation. The CEDAW Committee has no enforcement authority; it can only make recommendations highlighting areas where more progress is needed in a particular country. Ratifying States submit a report on how they are implementing the Convention one year after ratification, then every four years thereafter. The CEDAW Committee reviews each report and comments on each State's progress.

[35] Malaysia is a signatory to CEDAW and ratified it in 1995. The first accession to the convention was made with a number of reservations, as it was felt that the relevant articles were in contradiction with the provisions of the laws of the country. Following the Beijing Conference, steps were taken to review Malaysia's reservations to the convention and reservations for arts. 2(f), 9(1), 16(b), (d), (e) and (h) were withdrawn. The Ministry of Women, Family and Community Development ("MOWFCD") had announced the government's intention to withdraw the reservations on arts. 5(a), 7(b) and 16(2). The remaining reservations were made to the following articles:

9(2) : equal rights with men with respect to the nationality of their children;

A

16(1)(a): equal rights to enter into marriage;

16(1)(c): equal rights and responsibilities during marriage and at its dissolution;

16(1)(f): equal rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of child; and

B

16(1)(g): the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

[36] It should be noted that an announcement to withdraw reservations does not amount to withdrawal until an instrument of withdrawal is deposited with the Secretary General of UN.

C

[37] In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation.

[38] In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism).

D

[39] According to the doctrine of incorporation, international law is simply two components of single body of knowledge called 'law'. 'Law' is seen as a single entity of which 'international' and 'municipal' versions are merely particular manifestation. A judge can declare a municipal law invalid if it contradicts an international law because, in some States, the latter is said to prevail.

E

[40] The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation. (See Dinah Shelton (ed), "*International Law in Domestic Legal System: Incorporation, Transformation and Persuasion" (Oxford University Press, 2011)*; Brownlie, I, "*Principles of International Law*," 3rd edn, London, 1996, Chapter 4).

F

G

[41] The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the Executive possesses the treaty-making capacity while the power to give effect domestically rests with Parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by Parliament.

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[42] The Federal Constitution of Malaysia contains no express provision with regards to the status of international law, or indeed any mention of international law at all. It does, however, contain certain provisions dealing with 'treaty-making capacity' in Malaysia.

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[43] The combined effect of art. 74(1) and the 'Federal List' in Ninth Schedule to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other

countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. With regard to the Executive power of the Federation, art. 39 provides that it shall be vested in 'the Yang di-Pertuan Agong and exercisable ... by him or by the Cabinet or by any Minister authorised by the Cabinet'. Since art. 80 ensures that the Executive authority of the Federation extends to all matters with respect to which Parliament may make laws, this means that the Cabinet or its authorised Minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.

[44] When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute. (See Heliliah Haji Yusof, "*Internal Application of International Law in Malaysia and Singapore*", [1969] Singapore Law Review, 62-71 at p. 65). In other words, even though the Executive has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty.

[45] In *PP v. Narongne Sookpavit & Ors* [1985] 1 LNS 20; [1987] 2 MLJ 100, at p. 106 (FC), the respondents were Thai fishermen arrested while on a vessel three miles from the Malaysian coast and charged under the Malaysian Fisheries Act 1963. The respondents were unable to rely on a defence based on a right of innocent passage, as codified in art. 14 of the Geneva Convention on the Territorial Sea. Shankar J held that:

> ... So before a convention can come into force in Malaysia, Parliament must enact a law to that effect. ... No Malaysian statute has been cited to me to show that Article 14 had become part of Malaysian law.

[46] In *PP v. Orhan Olmez* [1987] 2 CLJ 13; [1987] CLJ (Rep) 305; [1988] 1 MLJ 13, the Supreme Court of Malaysia applied art. 32 of the Vienna Convention on the Diplomatic Relations 1961, which had been transformed into Malaysian law by means of the Diplomatic Privileges (Vienna) Convention Act 1966. Another example of the application of international treaties by the Malaysian Courts through a statute made by Parliament is the case of *Regional Centre for Arbitration v. Ooi Beng Chooi Anor. (No. 2)* [1988] 7 MLJ 193. In that case, the court referred to a subsidiary legislation known as the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 made pursuant to ss. 3 and 4 of the International Organizations Privileges and Immunities of the United Nations, 1946, to which Malaysia is a party.

[47] The learned author, Tunku Sofiah Jewa, in her book "*Public International Law – A Malaysian Perspective*", Vol. I Pacific Publication, 1996 stated at p. 35:

> Treaties to which Malaysia is a party may either require subsequent legislation, in which case they become the law of the land as soon as the necessary laws are enacted or, they may not in which case they remain within a special category of Malaysia's international law, **binding only herself *vis-à-vis* the other parties to the treaties but having no effect as such on Malaysian subjects**. (emphasis added)

[48] Further, Kevil YL Tan and Thio Li-Ann in Constitutional Law In Malaysia and Singapore wrote:

> Although CEDAW contemplates taking appropriate measure, including legal measure, against private parties which commit gender discrimination, the treaty is not self-executing and needs to be given effect by a domestic statute which confers a horizontal reach upon treaty norms.

[49] In our considered opinion, in Malaysia, unless a treaty is domesticated, it cannot be enforced. In other words, without express incorporation into domestic law by an act of Parliament following ratification of CEDAW, the provisions of the international obligations in the said Convention do not have any binding effect.

[50] In sum, insofar as Malaysia is concerned, treaties only domestically enforceable where they have been incorporated by statute. Ratification alone does not make the provisions of treaties applicable for municipal law.

[51] In *Malone v. Metropolitan Police Commissioner* [1979] Ch 344, the plaintiff asked the court to hold that a right to immunity from telephonic interception existed based, in part, on art. 8 of the European Convention on Human Rights ("ECHR"). Sir Robert Megarry V-C, in delivering the judgment of the court, cautioned that courts in the United Kingdom could not implement treaties through the back door:

> It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the crown's obligations, or to discover for the first time that such rules have always existed.

[52] We may venture to say that looking from a dualist perspective, the act of incorporating a treaty into municipal law by way of transforming it into statutory law serves as a democratic check and can in part make up for the lack of direct participation of parliament in treaty making. Further, legislators may regard it necessary to tailor the treaty, through an act of transformation, to match domestic circumstances. The legal language used in a treaty may not be compatible with the language used in the legal system of an implementing State. The provisions of the treaty may further require elaboration or other adjustment to make treaty provisions enforceable within

the legal system of an implementing State. Legislators may also wish to limit direct application to certain provisions of a treaty. The reason may be that the State does not intend to comply with its international obligation to implement the treaty as a whole, or that it wishes to delay the implementation of certain parts of the treaty.

[53] Before we conclude, it is pertinent to note that in Malaysia, the Federal Constitution is silent as to the primacy of international law or municipal law or *vice versa*. If there is such a conflict, the general rule is that the statute shall prevail. *PP v. Wah Ah Jee* (1919) 2 FMSLR 193, (FMS Supreme Court) is illustrative of the point. The learned judge in that case stated that the court must take the law as they found it expressed in the enactments. It was not the duty of a judge or magistrate to consider whether the law so set forth is contrary to international law or not.

[54] It is obvious that *PP v. Wah Ah Jee* (*supra*) followed the *dictum* in the English case of *Mortensen v. Peters* (1906) 8 and (j) 93, where it was held that:

> In this court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms ...

Conclusion

[55] In the result, we came to the unhesitating conclusion that cl. 5.1(4) of the Agreement does not discriminate against the rights of women. All clauses contained in the Agreement, especially cl. 5.1(4), do not restrain marriage and/or prohibit pregnancy if the respondent had completed the said Trainee Aircraft Maintenance Engineer Programme in the manner as stipulated in the Agreement.

[56] We, therefore, unanimously allowed the first appeal with no order as to costs, and we set aside the order of the High Court. Deposit to be refunded.